IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 196 of 2003
With
SPECIAL CRIMINAL APPLICATION No. 197 of 2003
With
SPECIAL CRIMINAL APPLICATION No. 198 of 2003
With
SPECIAL CRIMINAL APPLICATION No. 199 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VANRAJSINH BHAISABBHAI JADEJA & 1 - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR YOGESH S LAKHANI,MR.SB VAKIL, MR.ND NANAVATI, MR.NITIN AMIN for Applicant(s) : 1 - 2.
MR.DIPEN DESAI APP for Respondent(s) : 1,
MR MC BHATT for Respondent(s) : 2,
MR MUKUL SINHA for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 12/09/2007

ORAL JUDGMENT

1. The petitioners have invoked Articles 226 and 227 of the Constitution as also the

provisions of the Code of Criminal Procedure, 1973 (for short, “the Code”) for the relief of transferring Sessions Case Nos.211 of 2000, 185 of 2001 and 27 of 2002 from the Court of learned Additional City Sessions Court No.11 to any other Court of competent jurisdiction. The grounds for making such prayer are based on the allegations and averments *inter alia* that the orders and attitude of learned Additional Sessions Judge, at the relevant time, of Court No.10, were causing genuine and reasonable apprehension in the minds of the petitioners, who were accused persons in the aforesaid criminal cases, about impartiality and fair treatment and trial before that Court. After entertainment of the petitions and grant of stay against further proceedings in the trial court, some grounds are added by way of amendment and the petitions have been listed from time to time and several interim orders are made including the order calling for Record and Proceedings of the trial court. At one stage, explanation of learned Additional Sessions Judge was called for in view of the grievance that the accused persons, including the petitioners before this Court, were required to mark presence before the Court despite the injunction against further proceedings granted by this Court. The learned Sessions Judge concerned has submitted a detailed explanation with confidential letter dated

03.04.2007, and explained the circumstances under which the trial court was required to mark presence and hold formal proceedings in the trial court.

2. Arguing the petitions on merits, learned senior advocate Mr.S.B. Vakil was expressly requested to explain as to how successive interlocutory orders made by the learned Additional Sessions Judge were prejudicial to the interest of the petitioners and inspiring apprehensions about result of the trial. A detailed discussion of those submissions on merits was, however, not required and the Court was expressly requested not to undertake that exercise in view of objection to maintainability of the application based on express provisions of Sub-Section (2) of Section 407 of the Code. The other grievance about learned Additional Public Prosecutor in charge of the cases in the trial court was admittedly not surviving.

3. Although Section 407 was not mentioned in the petition, it was fairly conceded that the subject and power of the High Court to transfer a criminal case were squarely covered by the provisions of Section 407 of the Code and, applying the proviso to Sub-Section (2) of Section 407, petitions would not be maintainable

in so far as the cases in question were sought to be transfered from one criminal court to another criminal court in the same sessions division, unless an application for such purpose was made to the learned Sessions Judge and rejected by him. Therefore, it was submitted on behalf of the petitioners that the petitions may be disposed only on that ground, without entering into merits of the contentions raised in support of the prayer for transferring the cases. That submission was also endorsed by learned A.P.P. Mr.Dipen Desai.

4. However, learned counsel appearing for respondent No.2 in Special Criminal Application No.196 of 2003, submitted that the petitions were required to be dismissed on merits after being admitted and entertained, so as to avoid further unconscionable delay which had already taken place. It was submitted by learned counsel Mr.M.C. Bhatt, appearing with Dr.Mukul Sinha, that in view of the Scheme of Chapter XXXI of the Code, powers of the High Court to transfer cases pending in any criminal court subordinate to it were plenary powers and could be exercised in cases where any of the grounds mentioned in Sub-Section (1) of Section 407 were made out. While the powers of Sessions Judge to transfer cases under the provisions of Section 408 were limited

and may not be invoked or exercised in cases where their transfer is sought from one learned Additional Sessions Judge to another learned Additional Sessions Judge, who would be presiding over parallel courts of concurrent jurisdiction. It was, therefore, submitted that the petitions were required to be entertained and dismissed on merits. Learned counsel relied upon judgment of the Kerala High Court in **State of Kerala V/s. Reny George and others [1981 CRI.L.J. 1352]**, more particularly the observations as under:-

> *"For the transfer of a case pending in a court an application for transfer has to be filed in a Court of superior jurisdiction. In other words, a Court has power only to transfer a case pending in a Court subordinate to it. An Additional Sessions Court and a Sessions Court are Courts of equal jurisdiction. Hence the power under S.408 of the Code cannot be invoked for the transfer of a Sessions Case from an Additional Sessions Court to a Sessions Court.....The prohibition in the proviso to Sub-Section (2) of Section 407 will have application only in cases where the Sessions Judge has the power to transfer. In a case where the Sessions Judge has no power of transfer no question of moving the Sessions Judge for a transfer arises. So, it goes without saying that an application for transfer of a Sessions Case made over to an Additional Sessions Judge can be entertained by the High Court under Sec.407 as the same will not be hit by*

the proviso to Section 407(2).”

5. Plain reading of the provisions of Section 407 clearly indicates that the High Court is empowered to transfer cases or appeals pending before any criminal courts subordinate to it, either on the report of the lower court, or upon an application of the interested party, or on its own initiative. However, the proviso is added under Sub-Section (2) to ensure that an application for transfer of a case is not directly made to the High Court where a case is sought to be transfered from one criminal court to another criminal court in the same sessions devision. “Criminal courts”, for the purpose of the Code, include “Courts of Session” as provided in Section 6 of the Code. And the State Government has to establish a Court of Session for every sessions division under the provisions of Section 9. It also provides for appointment of Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session. Therefore, there has to be a Court of Session for every sessions division and there can be Additional Sessions Judges and Assistant Sessions Judges in a Court of Session. Therefore, irrespective of whether an Additional Sessions Judge is subordinate to the Sessions Judge or not, he presides over one of the

criminal courts in the same sessions division and in that view of the matter, application for transferring a case from one Additional Sessions Judge to any other Sessions Court in the same sessions division would be squarely covered by the express provisions of the proviso to Sub-Section (2) of Section 407.

6. The above view and reading of the express statutory provisions is supported by a Full Bench decision of the Allahabad High Court in **Radhey Shyam and another V/s. State of U.P. [1984(2) (Crimes) 50]**; wherein, following pertinent observations are made:

> *"7. It, therefore, follows that no application by a party interested is maintainable in the High Court for transferring a trial or an appeal whether its hearing has commenced or not, from one Additional Sessions Judge to another Additional Sessions Judge in the same sessions division unless an application for such transfer has been made to the Sessions Judge and rejected by him in view of the proviso to sub-section (2) of Section 407, Criminal Procedure Code.*
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> *8. The reason for imposing a bar on a direct application to the High Court by the proviso to sub-section (2) of Section 407, Criminal Procedure Code appears to be the conferment of concurrent power of transfer on the*

Sessions Judge of case from one Criminal court to another Criminal court in his sessions division if it is expedient for the ends of justice under Section 408(1), Criminal Procedure Code and the exercise of this power on an application of a party interested under Section 408(2), Criminal Procedure Code. A party interested is thus required to move such an application before the Sessions Judge first and only after it is rejected that such an application is maintainable in the High Court under Section 407(2), Criminal Procedure Code. It may be mentioned that in view of Section 412, Criminal Procedure Code reasons have to be given by the Sessions Judge for rejecting an application under Section 408, Criminal Procedure Code. It, therefore, follows that the Sessions Judge is empowered under Section 408(1), Criminal Procedure Code to transfer a trial or an appeal from one Additional Sessions Judge to another Additional Sessions Judge in his sessions division whether its hearing has commenced or not (sic) an application by a party interested if it is expedient in the interest of justice.

9. It is significant to note that the proviso to sub-section (2) of Section 407, Criminal Procedure Code only bars an application by a party interested to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division unless such an application for transfer has been made to the Sessions Judge and rejected by him. It does not impose any bar on the power of the High Court under Section 407(1), Criminal Procedure Code to transfer a case from

one Criminal Court to another Criminal Court in the same sessions division, either on the report of the lower court or on its own initiative under Section 407(2), Criminal Procedure Code.

10. The power conferred on the Sessions Judge under Section 408(1), Criminal Procedure Code to transfer a case from one Criminal Court to another Criminal Court in his sessions division can be exercised by him either on the report of the lower court or on the application of the party interested or on his own initiative under Section 408(2), Criminal Procedure Code. It is true that an Additional Sessions Judge is not a lower court as he exercise jurisdiction in the same court of session in which the Sessions Judge exercises jurisdiction. Thus a report by an Additional Sessions Judge for the transfer of a case to another Additional Sessions Judge in the same sessions division is not maintainable by the Sessions Judge. But from this it cannot be inferred that the Sessions Judge is not competent to transfer a case from one Additional Sessions Judge to another Additional Sessions Judge in his sessions division either on the application of the party interested or on his own initiative as under sub-section (1) of Section 408, Criminal Procedure Code, the Sessions Judge is empowered to transfer a case from one Criminal Court to another Criminal Court in his sessions division irrespective of the fact whether they are lower courts or not.....”

7. In view of the above discussion and

judgment of Full Bench of the Allahabad High Court, this Court respectfully disagrees with the opinion of the Kerala High Court in State of Kerala V/s. Reny George and others (supra). Accordingly, the petition is required to be rejected only on the ground of the bar of Sub-Section (2) of Section 407 of the Code. There was limited consensus at the bar that the sessions cases sought to be transferred were interconnected and there were cross-cases in which trial was practicably completed and, after examination of almost all witnesses in both the cases, trials were required to be concluded in accordance with law as expeditiously as practicable. It was submitted that any further delay in disposal of the criminal cases may not be in the interest of justice and, therefore, if the petitioners propose to make similar applications for transfer of cases before learned Sessions Judge, they must be heard and disposed as expeditiously as practicable.

8. Accordingly, the petitions are dismissed without examining on merits the grounds for transfer of cases and with the observation that, in view of the delay already caused in conclusion of the trial, subsequent proceedings will have to be conducted and concluded as expeditiously as practicable. The explanation submitted by

learned Additional Sessions Judge pursuant to the interim order of this Court is required to be accepted in view of the facts and circumstances submitted in the application and the provisions of Section 309 and Sub-Section (6) of Section 407 of the Code. Rule in each of the petitions is discharged with no order as to costs. The Record and Proceedings shall be returned to the trial court on or before **21.09.2007**. It will be open for the petitioners to approach the Sessions Court with appropriate applications for transfer of the criminal cases as also for staying the proceedings in the meantime, which applications may be decided on their own merits in accordance with law.

(D.H.WAGHELA, J.)

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